

Hon. Kyle Bryson, Petitioner
Presiding Judge
Superior Court of Arizona in Pima County
110 W. Congress St., Tucson, AZ 85701

IN THE SUPREME COURT

STATE OF ARIZONA

PETITION TO PERMANENTLY)	No. R-20-
ADOPT RULES FOR THE FAST TRIAL)	
AND ALTERNATIVE RESOLUTION)	
PROGRAM ("FASTAR"))	
_____)	

By Administrative Order No. 2017-116, this Court adopted Rules of the Fast Trial and Alternative Resolution Program, commonly referred to by the acronym "FASTAR," for a pilot program in the Superior Court of Arizona in Pima County. The pilot program has made significant progress in accomplishing its objectives. In anticipation of making the program a permanent feature in Pima County, and to facilitate the implementation of similar programs in other counties, Petitioner now requests the Court to permanently adopt those rules, with several modifications. The proposed modifications to the FASTAR rules and forms appear in the Appendix and are shown by strikethrough, underline, and yellow highlights.

- Bullet points in this petition discuss the reasons for each of the requested modifications.

(1) Background. Supreme Court Administrative Order No. 2015-126 established the Committee on Civil Justice Reform (“CJRC”). In October 2016, the CJRC submitted to the Arizona Judicial Council (“AJC”) its final report with more than a dozen recommendations. Several of these recommendations culminated in the Court’s adoption by Order No. R-17-0010 of amendments to the Arizona Rules of Civil Procedure (“Civil Rules”), including a tiering system of differentiated case management.

The CJRC also recommended the implementation of a pilot program in Pima County that allowed plaintiffs whose complaints requested a limited amount of money damages (essentially, Tier 1 cases) to opt for a short trial rather than proceeding to compulsory arbitration under current Civil Rules 72 through 77. The compulsory arbitration program was originally intended to provide a speedy and economical alternative to a jury trial. However, after years of experience with the compulsory arbitration program, the CJRC determined that these goals were not uniformly achieved.

The CJRC found that the time from filing a complaint to the entry of judgment on an arbitration award could require as much time as if the matter had initially gone to trial. The CJRC also found that court-appointed arbitrators occasionally have no

experience in the subject matter they are arbitrating, or that setting arbitration hearings and deciding cases are lesser priorities for arbitrators than attending to their clients' cases. Some litigants reportedly felt they did not have their day in court when their case was heard in an attorney's office rather than a courtroom.¹ Compulsory arbitration provides a right to appeal an arbitration award, but "appeal" is a misnomer; it is really a trial de novo that often involves new witnesses and evidence—increasing rather than mitigating litigation costs—rather than strictly an appeal on the record of the arbitration. Moreover, defendants who prevail at the new trial can obtain potentially draconian sanctions, including attorney's fees and expert witness fees, against a plaintiff who nonetheless prevailed at the arbitration. (See Civil Rule 68(g) regarding sanctions on an offer of judgment, and Civil Rule 77(h) concerning sanctions on an appeal from a compulsory arbitration award.)

(2) The FASTAR Program. The proposed FASTAR rules were previously adopted by Administrative Order No. 2017-116 in conjunction with a FASTAR pilot program in the Superior Court of Arizona in Pima County. The three-year pilot began in November 2017, and these rules provided a procedure for cases in the pilot. The rules apply in superior court cases in which a plaintiff requests only monetary damages, and the amount sought by any party does not exceed \$50,000. The rules

¹ One commentator observed that a hearing before a conscripted lawyer in a law office is not the equivalent of a day in court.

allow claimants to choose either Alternative Resolution, which is like compulsory arbitration, or a Fast Trial before a judge or a jury. The Fast Trial option allows plaintiffs to have their day in court, eliminates the need for an expensive trial de novo following an arbitration award, provides trial experience for attorneys, and underscores the historic and cultural role of juries in the American justice system.²

(3) The FASTAR Rules. The FASTAR rules were vetted by members of the Pima County Bar during judicial outreach before the start of the pilot program. To easily differentiate these rules from the Rules of Civil Procedure, each FASTAR rule is identified by a three-digit number. The FASTAR rules are in three parts. Part One applies to all FASTAR cases. Three FASTAR forms are associated with the rules in Part One. Parts Two and Three respectively apply to cases in the Fast Trial and Alternative Resolution Tracks.

² A recent phenomenon is known as the “vanishing jury trial.” See, for example, an article by Rosalind Greene and Jan Mills Spaeth, [“The Vanishing Jury,”](#) in the April 2010 issue of the *Arizona Attorney*: “In 2001, of the total number of civil cases disposed of in Arizona, five percent were tried before a jury (2,331 versus 49,333, excluding appeals). This percentage has dropped consistently since then. In 2008, this percentage was one percent (346 jury trials versus 65,502 dispositions, excluding appeals).” See further an article by Kelly Wilkins and Troy Daniel Roberts, [“Arizona Civil Verdicts: 2018,”](#) *Arizona Attorney*, June 2019: “The number of reported verdicts is still declining. The number of Arizona cases that are tried all the way to verdict started to decline in 2009. Each year since then except for 2016, the number of trials dropped.” With so few civil jury trials, how do counsel get trial experience? The FASTAR program promotes the use of jury trials and provides new attorneys with jury trial experience.

Part One: Rules for the Fast Trial and Alternative Resolution Program

(Rules 101 through 109).

Rule 101: Fast Trial and Alternative Resolution Generally. Rule 101(a) introduces the FASTAR acronym and allows citations to these rules by that acronym. Rule 101(a) also recites the program’s objective, which is “to achieve a more efficient and inexpensive, yet fair, resolution of eligible cases.”

- Petitioner is requesting a noteworthy change to Rule 101(a). The current provision says that the FASTAR rules “apply in counties designated for the superior court’s pilot program for a fast trial with an alternative resolution option.” Petitioner proposes modifying this clause to say that the rules “apply in counties where the superior court has established a program for a fast trial with an alternative resolution option.” This modification would allow any of Arizona’s 15 counties to establish a permanent FASTAR program by local rule, administrative order, or policy.

Rule 101(b) requires the court administrator to assign civil actions to the program that meet these four eligibility criteria: (1) the plaintiff requests only monetary damages, and not injunctive or non-monetary relief; (2) the amount of money sought by each plaintiff exceeds the limit set by local rule for compulsory

arbitration³; (3) the amount of money sought by any party, including punitive damages but excluding attorney fees, does not exceed \$50,000; and (4) the plaintiff will not need to complete service on any defendant in a foreign country. This last criterion excludes cases involving international service because that might require more time than contemplated by Rule 104, discussed below. Rule 101(c) provides that these rules supplement the Arizona Rules of Civil Procedure, and that the Civil Rules—excluding Rules 72 through 77, the rules on compulsory arbitration—continue to apply to FASTAR cases. However, Rule 101(c) also says that a FASTAR rule applies when a civil rule is inconsistent with a FASTAR rule, or if the FASTAR rules specifically provide otherwise.

- In Rule 101(b), Petitioner proposes adding the words “or Clerk,” i.e., “the court administrator or Clerk will assign to the FASTAR program....” This modification would account for different county-by-county practices in who has responsibility for assigning cases.

Rule 102: Certificates; Forms. Rule 102(a) requires a plaintiff who files any civil case that requests money damages not exceeding \$50,000 for any one claimant to concurrently file a certificate (Form 102(a)) stating whether the case meets the four eligibility criteria specified in Rule 101, and to serve the certificate with the

³ In conjunction with the pilot program, the Superior Court in Pima County lowered its limit for compulsory arbitration to \$1,000.

summons and complaint. Rule 102(b) requires a defendant who disagrees with plaintiff's certificate to timely file a controverting certificate (Form 102(b)).

- In Rule 102(a), Petitioner requests a clarifying amendment that adds the word “only,” i.e., “At the time of filing any civil complaint requesting only money damages not exceeding \$50,000....”

Petitioner also proposes adding to Rule 102 a new section (d) titled “Exceptions.” The text of this new section says,

If extraordinary case characteristics indicate that an otherwise eligible case is not suitable for FASTAR, a party for good cause shown may request the court under Civil Rule 26.2 to assign the case to a different tier.

This provision would act as a safety valve and allow the court in exceptional circumstances to assign an otherwise eligible case to a different tier under Civil Rule 26.2, thereby removing the case from FASTAR. The term “case characteristics,” as well as a standard of good cause shown, are also used in Civil Rule 26.2, which further link this new FASTAR provision to the court's authority to reassign cases under Civil Rule 26.2(c).

Rule 103: Plaintiff's Choice. Rule 103(a) states that for every case in the FASTAR program, the plaintiff alone has the choice of whether the case should proceed by Fast Trial or Alternative Resolution. Under Rule 103(b), the plaintiff must file a “Choice Certificate,” making this election when filing the complaint or within 20 days after the first filing by a defendant. A key provision of Rule 103(b)

provides that if the plaintiff elects the Alternative Resolution option, the plaintiff waives two rights: the right to have a trial before a judge or jury, and the right to appeal the Alternative Resolution award to the superior court (i.e., waives the right to a trial de novo) or to an appellate court. If the plaintiff does not timely file a Choice Certificate, the case proceeds to Fast Trial under Rule 103(c). Rule 103(d) describes the effect of a counterclaim. The rule provides that if the plaintiff chose Alternative Resolution and the defendant thereafter filed a counterclaim, the plaintiff retains the right to appeal the award on the counterclaim, Rule 103(b) notwithstanding.

- Petitioner is requesting a non-substantive change, specifically, that the Choice Certificate, which is unnumbered in the current FASTAR rules, have a numerical designation: Form 103(b). A reference to Form 103(b) was added to Rule 103(b)(1).

Rule 104: Modification of Civil Rule 4(i). Rule 104(a) states that Civil Rule 4(i), which provides a 90-day limit for service of process, does not apply to FASTAR cases. Instead, the plaintiff must serve process within 60 days. If the plaintiff does not do so, then under Rule 104(b), the court will notify the plaintiff of its intent to dismiss the case, without prejudice, in 15 days. Rule 104(c) permits the plaintiff to request a 30-day extension to complete service. Under Rule 104(d), if a served defendant has not filed a response to the complaint, and if the plaintiff has not

applied to default that defendant, then the court, after notice, will dismiss that defendant on the 120th day after the complaint was filed.

Some attorneys reported challenges in meeting the FASTAR service deadline. If a case presents extraordinary circumstances concerning service of a complaint—rather than difficulties resulting from tardiness in attempting service—proposed Rule 102(d), discussed above, might provide an avenue for relief.

Rule 105: Modification of Civil Rules 4.1 and 4.2 Regarding Waiver of Service. Civil Rule 4(f) distinguishes accepting service and waiving service. Waivers of service are further governed by Civil Rules 4.1(c) and 4.2(d). FASTAR 105 modifies the time specified in the Civil Rules for responding to a summons and complaint after a waiver of service.

Rule 106: Assignment of a Judge. The rule requires the assignment of a judge to every FASTAR case and allows notices of change of judge as provided by Civil Rules 42.1 and 42.2.

Rule 107: Medical Authorizations. Rule 107 is a codification of a best practice and is intended to mitigate discovery disputes and concomitant delay. In a personal injury action, and except for records subject to a properly asserted privilege claim, Rule 107 requires a plaintiff to provide the defendant with a written authorization that allows the defendant to obtain copies of records identified in a

disclosure statement or that otherwise relate to the condition that is the subject of the action.

Rule 108: Disclosure and Discovery Disputes. FASTAR Rule 111(d) currently provides that Civil Rule 16(b), which requires parties to file a joint report and proposed scheduling order, does not apply to Fast Trial Cases. Petitioner believes the requirements also should not apply to cases in the Alternative Resolution track. Accordingly, a new Rule 108(a) (“generally”) now includes a broader provision that exempts all FASTAR cases from the requirements of Civil Rule 16(c). New Rule 111(a) also clarifies that the requirements of Civil Rule 16(b), which pertains to the required early meeting, do apply in FASTAR cases.

Rule 108(b) (“disclosure and discovery disputes”) contains the text of current Rule 108. This provision requires parties who have disclosure or discovery disputes that they cannot satisfactorily resolve to present their dispute to the court in a joint motion, with each side’s position stated in no more than 1-½ pages. A modification to the provision would no longer allow the arbitrator to rule on such motions. Instead, and because the plaintiff in an Alternative Resolution proceeding has no right to appeal, the motion would be presented to the assigned judge.

Rule 109: Application of Civil Rule 68 Regarding Offers of Judgment. The rule provides that Rule 68 (an offer of judgment) does not apply to a Fast Trial but such an offer is permitted in an Alternative Resolution proceeding. This rule

ameliorates the chilling effect that Rule 68 can have on plaintiffs who exercise the right to trial, but as a compromise, the rule leaves the Rule 68 option intact for Alternative Resolution.

Part Two: Rules for a Fast Trial (Rules 110 through 119).

Rule 110: Role of the Assigned Judge. This rule simply provides that the assigned judge will make all legal rulings in the case, including rulings on motions, and will conduct a trial.

Rule 111: Conferences; Trial. Rules 111(a) and (b) require the judge to set a status and trial setting conference within 120 days—and a trial date at least 190 but not more than 270 days—after the complaint was filed. Rule 111(c) permits the judge to set one or more Rule 16 pretrial conferences. FASTAR Rule 111(d), which currently provides that Civil Rule 16(b) is inapplicable in Fast Trial cases, would be abrogated and replaced by new FASTAR Rule 108(a), discussed above. Rule 111(e), which allows the judge to impose sanctions against a party who is unprepared to participate in a court conference in good faith, would be renumbered as FASTAR Rule 111(d).

Rule 112: Disclosure and Discovery in Fast Trial Cases. Rule 112(a) requires the exchange of disclosure statements within 20 days after the filing date of the first answer. Compare Rule 26.1(f), which has a 30-day deadline, and FASTAR Rule 122(a), which also has a 30-day deadline.

- To conform the Fast Trial disclosure deadline with the other mentioned deadlines, Petitioner requests the Court to modify Rule 112(a) so that it also provides a 30-day deadline for the initial disclosure.

The discovery limits in Rule 112(b) correspond with the discovery limits in Tier 1 cases under Civil Rule 26.2. Under Rule 112(c), the parties must complete discovery within 120 days after the filing of the first answer, or 190 days after the filing of the complaint, whichever is sooner.

Rule 113: Depositions of Medical Providers and Other Experts. Rule 113 contains several special provisions for deposing an expert or a medical provider, regardless of whether the medical provider is identified as an expert witness. Under Rule 113(a), and to mitigate costs, the duration of these depositions is limited to one hour per side and a total of two hours. To minimize disruption, the parties must endeavor to take the deposition at the expert's or provider's usual place of business. Rule 113(b) limits the expert's or provider's deposition fee to that person's usual fee, but it may not exceed \$500 per hour without good cause. Moreover, the fee must be paid by the attorneys attending the deposition in proportion to the time each attorney used for asking questions. Under Rule 113(c), a party may record the deposition by any unobtrusive or reliable device without leave of court and must promptly provide a copy of the recording to the other parties without charge.

Rule 114: Summary Judgment Motions. Civil Rule 56(b) requires that a motion for summary judgment be filed 90 days before trial. Rule 114 reduces that time to 60 days and provides shorter periods than Civil Rule 56(c) for filing a response or reply.

Rule 115: Settlement. Rule 115(a) requires parties who settle a Fast Trial case to file an appropriate stipulation for entry of judgment or for dismissal. If the parties fail to timely notify the court of a settlement, they are responsible for payment of jury fees.

Rule 116: Defaults. This rule allows the court to conduct Civil Rule 55 default proceedings against any defaulted defendant, and to proceed with a Fast Trial for the remaining parties.

Rule 117: Fast Trial. Under Rule 117(a), the court sets each Fast Trial case for a jury trial, without the necessity of a jury demand, but the parties may stipulate to waive a jury. The parties also may stipulate to having 6 jurors decide the case, rather than 8, and in that event, 5 of the 6 jurors must agree on a verdict. Alternate jurors are not required. Rule 117(b) specifies the required contents for the parties' pretrial statement and provides that a party may not call a witness or offer an exhibit not identified in the pretrial statement. Rule 117(c) details additional documents the parties must file for a jury trial, such as questions for jury selection, jury instructions, and verdict forms.

Rule 117(d) provides that the Arizona Rules of Evidence apply to a Fast Trial. However, certain documents listed in the joint pretrial statement—including medical bills, records, and reports; repair bills; records of regularly conducted activity; and a witness’ deposition—are admissible if there is no objection. Subject to objections, a party who deposed and made a video recording of an expert or medical provider under Rule 113(c) may introduce the recording to avoid the cost of calling the person at trial. Rule 117(f) authorizes the issuance of subpoenas for a Fast Trial pursuant to Civil Rule 45. Rule 117(g) specifies the order of a Fast Trial—it’s as described in Civil Rule 40—and provides that the Civil Rules govern such things as jury selection, juror notebooks, questions from the jury, deliberations, and the return of a verdict. Rule 117(g) also has a presumptive 2-day limit on the length of a Fast Trial, with per side limits of 15 minutes for voir dire, 20 minutes for opening statements, 3 hours for a case-in-chief and cross-examination, and 30 minutes for closing argument.

Rule 118: Post-Trial Procedures; Appeal. Under Rule 118(a), the process by which the prevailing party must prepare a statement of costs and request for attorneys’ fee (if any), and for the entry of judgment, are as provided in Civil Rules 54 and 58. In the event the jury verdict exceeds the FASTAR monetary limit, Rule 118(b) provides that the court must enter judgment for the full verdict amount.

Under Rule 118(c), a party may file post-trial motions as in other civil cases. Rule 118(d) allows the appeal of a final Fast Trial judgment as provided by law.

Part Three: Rules for Alternative Resolution (Rules 120 through 126).

FASTAR Rules 120 through 126 generally correspond to Civil Rules 72 through 77, as noted in the table below. Noteworthy differences between these Civil Rules and the FASTAR rules are discussed in the text that follows the table.

FASTAR Rule #	FASTAR Rule Title	Civil Rule #	Civil Rule Title
--	none	72	Suitability for Arbitration
120	Assignment of an Arbitrator	73	Appointment of Arbitrator
121	General Duties of an Arbitrator	74	General Proceedings and Prehearing Procedures
122	Prehearing Procedures		
123	Hearing Procedures	75	Hearing Procedures
124	Arbitrator's Decision, Award, and Judgment	76	Posthearing Procedures
125	Arbitrator's Compensation		
126	Appeal	77	Appeal

There is no equivalent to Civil Rule 72 (“suitability for arbitration”) in Part Three of the FASTAR Rules because suitability for Alternative Resolution is determined by two preliminary FASTAR Rules, Rules 102 and 103.

Rule 120: Assignment of an Arbitrator. Unlike Civil Rule 73, FASTAR Rule 120(a) begins with this general statement: “An arbitrator conducts an Alternative Resolution Proceeding.” So, although a proceeding under the Civil Rules is called “compulsory arbitration” and under FASTAR it is called “Alternative Resolution,” both proceedings are conducted by an arbitrator. FASTAR 120 is unlike Civil Rule 73 because it includes a provision (section (c)) allowing the court administrator to maintain a list of specialty arbitrators with designated areas of specialization, concentration, or expertise. This provision is intended to match the arbitrator’s experience with the subject matter of the case. Also, FASTAR 120, section (i), allows duties otherwise performed by the court administrator to be performed by the court clerk, as provided by local rules, administrative orders, or policies. This provision might be of special benefit to the superior court in smaller counties. Civil Rule 73 includes a provision for “arbitration by agreement of reference,” whereas FASTAR 120 contains no corresponding provision.

Rule 121: General Duties of an Arbitrator, and Rule 122: Prehearing Procedures. Civil Rule 74 was separated into two FASTAR rules to focus on the distinct subject matters of that civil rule. FASTAR Rule 121(a) (“arbitrator’s powers”) is like Civil Rule 74(a), except it adds a new second sentence that says, “An arbitrator is personally immune from suit with respect to actions taken under this and the following rules.” FASTAR Rule 121(d) (“offer of judgment”), although

somewhat redundant to FASTAR Rule 109, is a reminder that parties to an Alternative Resolution proceeding may make Civil Rule 68 offers of judgment.

FASTAR Rule 122(a) provides a 30-day period for exchanging disclosures in the Alternative Resolution track. Because it is procedural in nature, the scheduling of an arbitration hearing (Civil Rule 74(c)) has been relocated to FASTAR Rule 122(b), within the rule on prehearing procedures.

- The Alternative Resolution rules do not currently include a deadline for completing discovery, nor do they contain discovery limits. To have similar limits as Fast Trial Rule 112(b) and a similar deadline as FASTAR Rule 112(c), Petitioner proposes amending FASTAR Rule 122 by adding a new section (f), which would provide as follows:

(f) Discovery Limits and Deadline. Discovery limits in an Alternative Resolution proceeding are the same as specified in FASTAR Rule 112(b). The parties must complete discovery within 120 days after the filing date of the first answer, or by another deadline established by the court.

Rule 123: Hearing Procedures. Rule 123 largely mirrors Civil Rule 75. However, a provision in Civil Rule 75(e) (“assessing damages against defaulted parties”) has been relocated to the prehearing provisions of FASTAR Rule 122.

Rule 124: Arbitrator’s Decision, Award, and Judgment, and Rule 125: Arbitrator’s Compensation. Rule 124 eliminates Civil Rule 76(a)(1), which requires the arbitrator to “make a decision,” because that is implicit in a subsequent provision that requires the arbitrator to “file a notice of decision.” As in current Civil

Rule 76(b), FASTAR Rule 124(b) allows the entry of an award exceeding the prescribed monetary limit, if appropriate. The section on “judgment” is similar to the current Civil Rule 76 provision, but to enhance the clarity of the FASTAR rule, the provision is separated into subparts. FASTAR Rule 124(f) (“application of Civil Rule 38.1(d)”) has no counterpart in Civil Rule 76, but this FASTAR provision allows stagnant Alternative Resolution cases to be placed on the dismissal calendar.

Rule 126: Appeal. There are several notable differences between FASTAR Rule 126 and Civil Rule 77 (“Appeal”). First, under Rule 126(a), a plaintiff who chose Alternative Resolution under Rule 103 may not file a notice of appeal. Rule 126(a) allows any other party to appeal, but the right to appeal is waived if a party failed to appear and participate at the Alternative Resolution hearing. (Compare Civil Rule 77(a): “Any party who appears and participates in the arbitration proceedings may appeal an arbitrator’s award....”) FASTAR Rule 126(d) elaborates on the misnomer “trial de novo.” This rule provides, “Although the proceeding is denominated as an ‘appeal,’ the parties are entitled to a trial on all issues determined by the arbitrator. The arbitrator’s legal rulings and factual findings are not binding on the court or the parties.” FASTAR Rule 126(d) also says, “If, however, the court finds that further proceedings before the arbitrator are appropriate, it may remand the action to the assigned arbitrator.” Compare Civil Rule 77(i), which says, “A court may contact an arbitrator regarding the arbitration award or other matters

relating to the arbitration.” FASTAR Rule 126(d) goes further by permitting a remand of the proceeding.

(4) Pima County’s FASTAR Pilot Program. The Pima County FASTAR pilot program began on November 1, 2017. Its December 2019 report to the AJC indicated that the pilot had processed more than 1,000 cases in two years. Attorneys in slightly more than half of those cases chose the Alternative Resolution track. In the Fast Trial track, there were 5 trials in the first year of the pilot, and 15 trials in the second year. There was one appeal in the first year, and there were no appeals in the second year. Apples-to-apples comparison of times to disposition for FASTAR cases and pre-2017 compulsory arbitration cases are not precise, but the times to disposition in FASTAR seem to be shorter.

The Pima County bench supports the FASTAR program. The program has not been a burden on the civil bench or court administrators. The program furthers the Court’s strategic goal of improving access to justice. Although Petitioner has received positive feedback from some attorneys and jurors about the program, other attorneys have been critical, especially about FASTAR’s shortened time periods. The changes proposed in this petition might at least partially address those criticisms. Opening this petition for public comment should produce stakeholder input regarding any other concerns.

5. Conclusion. Petitioner therefore requests that the Court open this petition for public comment, allow Petitioner to subsequently file a reply to those comments, and ultimately, adopt modified FASTAR rules.

RESPECTFULLY SUBMITTED this 9th day of January 2020.

/s/

Hon. Kyle Bryson
Presiding Judge
Superior Court of Arizona in Pima County